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No. 95-1505

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LOUISE BASS, Surviving Spouse of KENNETH BASS, Deceased, MAURICE BASS and CHRISTOPHER BASS,

Petitioners,

vs.

NATIONAL SUPER MARKETS, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than the questions identified by the petitioners, would be presented for review in this case:

1. Whether this Court is without jurisdiction to review petitioners' petition for writ of certiorari in that the two (2) questions presented for review in the petition were never presented to the Missouri courts. These questions were first raised in petitioners' Motion for Rehearing to the Missouri Supreme Court after its opinion.

2. Whether there is a true federal question raised by the Missouri Supreme Court's opinion in question (Appendix D to the petition) for it does not state any "new law".

3. Whether the Missouri Supreme Court improperly deprived the petitioners of their right to a jury trial.

4. Whether the Missouri Supreme Court should have given its decision prospective-only application.

LIST OF INTERESTED PARTIES

The petitioners are Louise Bass, Surviving Spouse of Kenneth Bass, Deceased, Maurice Bass and Christopher Bass.

The respondent is correctly identified in the caption except that National Super Markets, Inc. is now in voluntary liquidation and its parent company is National Tea Company, Inc.

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Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Missouri Supreme Court. The opinion of the Missouri Supreme Court is reported at 911 S.W.2d 617 (Mo. banc, petition for rehearing denied, December 18, 1995). (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix D to the petition.)

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The two (2) questions presented for review in the petition were never presented to the Missouri courts. These questions were first raised in petitioners' motion for rehearing to the Missouri Supreme Court after its opinion. There is no true federal question raised, nor did the Missouri Supreme Court's opinion in question (Appendix D to the petition) state any "new law".

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari. The facts of this case together with the Missouri Supreme Court's interpretation of Missouri R.S. § 287.040 (1994) (Missouri Workers' Compensation Act) raises no constitutional questions not already answered.

A. Course of Proceedings and Disposition of the Case Below

Petitioners filed their wrongful death action against the respondent and others in 1988, after petitioners had filed a Workers' compensation claim pursuant to the Missouri Workers' Compensation Act, § 287.010 *et seq.* Respondent, from the outset contended that the petitioners' sole remedy was the benefits payable under the Missouri Workers' Compensation Act, since the decedent as a "Statutory Employee" of respondent

pursuant to the Missouri Workers' Compensation Act. The initial pleading filed by the respondent was its motion to dismiss for failure to state a claim. This was overruled by the Circuit Court.

Later, after the petitioners had received the benefits due them under the Missouri Workers' Compensation Act, and discovery completed, the respondent filed its Motion for Summary Judgment citing the petitioners' sole remedy under Missouri law was the benefits payable under the Missouri Workers' Compensation Act. This was overruled by the circuit court (after it had sustained an identical Motion for Summary Judgment as to an identical claim by the widow of the security guard who also was killed during the robbery).

The case proceeded to trial. At the conclusion of the petitioners' case, respondent filed its Motion for a Directed Verdict, among other items the motion stated that the petitioners' claim was barred by the Missouri Workers' Compensation Act. This Motion for a Directed Verdict at the close of the petitioners' case was denied. Respondent then presented its case and at the conclusion of all the evidence the respondent filed its Motion for a Directed Verdict at the close of all the evidence, among other items the motion stated that the petitioners' claim was barred by the Missouri Workers' Compensation Act. This motion also, was denied.

The jury returned a verdict against the respondent. Within the time allowed by the Missouri Rules of Civil Procedure, respondent file its Motion for Judgment Notwithstanding the Verdict (hereinafter referred to as "JNOV"). This motion was sustained. The trial court found that the petitioners' cause of action was barred because of the Missouri Workers' Compensation Act, the decedent was a "Statutory Employee" of the respondent's and therefore petitioners' sole remedy was the

benefits already paid to the petitioners under the Missouri Workers' Compensation Act.

Petitioners appealed the trial court's granting of the JNOV to the Missouri Court of Appeals, Eastern District (*see* Appendix E to the petition). Missouri Court of Appeals, Eastern District Division Three, set aside the trial court's granting of the JNOV to respondent, and reinstated the jury's verdict in favor of the petitioners. Respondent, before the Missouri Court of Appeals, Eastern District, sought a rehearing or transfer to the Missouri Supreme Court, the Missouri Court of Appeals, Eastern District, denied rehearing or to transfer to the Missouri Supreme Court. Respondent requested the Missouri Supreme Court to accept transfer, which they did. The Missouri Supreme Court, (*en banc*) handed down their opinion (*see* Appendix D to the petition) on November 21, 1995 sustaining the trial court's granting of the JNOV to respondent.

Petitioners filed their Motion for Rehearing before the Missouri Supreme Court, December 6, 1995, (*See* Appendix "B") which motion was denied December 19, 1995. (*See* Appendix A to petition).

B. Corrections of Misstatements in the Petition

Respondent is dissatisfied with petitioner's statement of the case and therefore provides the Court with the following:

Petitioners' Statement of the Case is divided into two parts. The first part, "Failure to Provide Adequate Security" is irrelevant to the issues raised in petitioners' petition for writ of certiorari. Accordingly, respondent will not address this section of petitioners' Statement of the Case. Respondent notes herein that petitioners' factual summary misstates several aspects of the evidence at trial. Petitioners' Statement of the Case factually

misstates the testimony that respondent "deviated from its security procedure(s)" when they stated:

> [O]n the night in question, Defendant deviated from this [security] procedure.

A review of the testimony establishes that there was no "deviation" in the "security procedure."

The Deceased was a "Statutory Employee" of respondent. (In addition to the $165,000 distributed to petitioners from co-defendant Barrington Bryce Detective Agency as settlement, petitioners also receive weekly workers' compensation benefits from Building Butlers, Inc.)

The second part of petitioners' Statement of the Case deals with the "The Statutory Employee Defense." Petitioners assert that Bass was employed to perform "specialized" polishing, buffing, and stripping services at the Natural Bridge store. Arthur Seise owned Building Butlers, the janitorial company that provided services to the respondent's Natural Bridge Store.

Seise described the service as "nightly floor service, that is we dust mopped the floor and scrubbed the floors with an automatic scrubber" and buffed the floor with a high speed propane buffer. BBI would "periodically" strip and wax the floors. The "specialized" service to which petitioners cite is the Pioneer Eclipse Program ("PEP"). Seise described the PEP as a line of chemicals and waxes and a line of propane buffers that the PEP company manufactures for supermarkets and sells to distributors throughout the country. This "specialized" PEP was the program National required BBI to utilize in the Natural Bridge store. Seise was aware that, during the time BBI was servicing the Natural Bridge National store, National used the PEP in all its stores regardless as to whether National's

employees or a contractor performed the janitorial services. BBI provided services to the Natural Bridge store from August, 1986 through the middle of 1988, including the date of this incident.

Seise used the PEP during the entire time Building Butlers worked at the National store. PEP is just one kind of floor service program that a company or janitorial service can use to keep the floors clean for the public.

The only item BBI provided to perform the janitorial service was the propane buffer that was stored on National premises, and BBI replaced the pads on the buffer and provide fuel. National supplied everything else to BBI relative to BBI being able to perform the job at the Natural Bridge store. National supplied all of the PEP cleaning materials (*i.e.*, neutral cleaner, wax, finishing liquids), and all the cleaning utensils such as dust mops and brooms. National owned the auto scrubber, which was a machine utilized by Bass or others to clean the floors. The propane buffer was stored at the Natural Bridge store.

On the night of the incident, Bass was not there for the purposes of stripping the floor. Bass was there to do something that National normally had BBI do each night which was to sweep, mop and buff. In other words, Bass performed the "regular or nightly maintenance." Seise usually had one person assigned to the Natural Bridge store. Bass was the one person permanently assigned to the Natural Bridge store. During the period surrounding the time of the incident, National would have one of BBI's personnel, in this instance Bass, come to the store each night. No one from BBI supervised Bass.

Stripping and waxing was not something that is out of the ordinary as far as floor maintenance is concerned. Based on Seise's experience, National would have its floors stripped and waxed every six to nine months. BBI would strip the floor at

National's request. When stripping, BBI had a crew of 4-5 people over a 3-4 night period.

Once every 5-8 days National or BBI applied a "restorer" to heavy traffic areas, and once every two weeks it waxed heavy traffic areas.

National had the right to direct and replace Bass.

Seise testified that, somehow cleaning had to get done at the 24 hour stores. In 24 hour supermarkets like Price Chopper, since cleaning activities need to be done to the store such as dust mopping, wet mopping, and buffing, the cleaning is done at some point during the 24 hours.

Seise testified that National employees cleaned the floors during the day.

Seise's training of his employees to do the job involved of the lead man or supervisor working with the employees for a couple of evenings to go through "the regular nightly maintenance work" with the scrubber, using the product, demonstrating how to hook up the buffer. Seise had nothing to do with the training of National employees who performed Bass' job at its other stores.

After arriving at the Natural Bridge store, Bass would do the following on a daily basis: 1) sweep the entire sales floor; 2) dust mop the store picking up labels or gum on the floor with a razor blade; 3) place the floor soaps into the auto scrubber and scrub the floor; 4) perhaps incidental spot mopping; and 5) run the propane after the floor dried. Based upon Seise's experience, this daily process was accomplished at the Natural Bridge store when the store is closed to the public.

At the time of the incident, the Natural Bridge store had three "porters", two during the day and one at night. The night person was with the janitorial service. The day porter would dust mop and wet mop the floor. The cleaning equipment for the floors, stored at National, included mops, brooms, scrub machines, and the cleaning supplies. Other than the buffer, the day porters used all of the equipment.

Co-manager, Joe Lenoir would tell the janitors from BBI of any special cleaning he wanted done other than the "norm."

Dan Hughes, Vice President, Smith-Scharff, sold the PEP to retailers such as National. The PEP floor care system consists of five components-the floor finish, floor sealer, neutral cleaner, restoration, and a floor stripper or floor finish remover. The "program" consists of products and the steps to apply the "program." The only component considered to have causticity is the floor stripper. If used properly, there should be no exposure to the product.

Hughes testified to the daily, weekly, monthly, and yearly maintenance and reviewed the steps of each. The "yearly" maintenance actually varied and 6-8 uses per year is normal in the grocery industry because of the foot traffic. The daily maintenance involves sweeping the floor, removing gum and stickers, cleaning with the auto scrubber, and buffing. All the steps of the daily maintenance are necessary to perform the program and are "integral" to the process, including sweeping and mopping.

National purchases all of its cleaning products from Smith-Scharff. Since 1984, National purchased from Smith-Scharff all of the floor cleaning products and equipment for the PEP from Smith-Scharff for all of its stores.

There are other companies that Smith-Scharff distributes for that have similar floor care programs to the PEP. Hughes has sold the PEP to National's competitors like Schnuck's and Dierberg's and Shop-N-Save. It is the custom in the supermarket industry to do the four step daily maintenance when the store is closed to the public, if possible, so as not to interfere with customers. National uses the PEP products and equipment on the floor during the day.

Schnucks and Dierberg's used its own in-house employees to apply the PEP. Hughes participated in the training of the Schnuck's and Dierberg's employees as to how to apply the PEP. Like National, Shop-N-Save used both its own in-house employees and janitorial services and participated in the training of the Shop-N-Save employees regarding how to apply the PEP.

National purchased an average of 5-8 auto scrubbers per year at a cost of $6,000 to $6,500 per scrubber. National also bought buffers from Smith-Scharff.

Anthony Summers was the Store Services Manager at National from 1982 through at least the time of the incident. Summers' duties consisted of, among other things, hiring the floor cleaning contractors and obtaining the chemicals and products used for cleaning the stores' floors. During that time, Missouri regulations existed regarding cleaning the floors in the stores in order to sell groceries in Missouri which National had to follow. Summers identified Department of Health Regulations governing sanitation of retail stores, which included a section regarding sanitation of floors. It was Summers' job to make sure National followed those rules. Summers also confirmed that National had to comply with the Department of Health rules, paragraph 23, which provides:

> Cleaning of floors, walls and ceilings shall be done as often as necessary but preferably during periods when the least amount of food is exposed such as after business hours. Only dustless methods of cleaning floors, walls and ceiling shall be used such as vacuum cleaning, wet cleaning, treated dust mops or the use of dust arresting sweeping compounds with brooms.

From 1982 through the date of the incident, representatives of the State of Missouri inspected National's stores to see if National complied with the regulations.

National also had to comply with Section 7-301, page 44, of the "Retail Food Stores Sanitation Code promulgated by United States Department of Health and Human Services," which provides:

> Cleaning of floors, walls and ceilings shall be done as often . . .

Summers was responsible for National starting to use the Pioneer Eclipse Program throughout its stores. The means of application of the PEP was the same as compared to what National was using with its own people before the changeover. Between 1982 and 1984, National essentially used the same program as PEP to clean its floors, including the type of chemicals and methods of application. The company through which it purchased the chemicals/products was Dart Research. Prior to using PEP, National's employees used a propane buffer in some of its stores, and National's employees used auto scrubbers, dust mops, and wet mops to clean the floors of its stores. National did not have to make a change in the purchasing of any equipment it already had to use for the Dart Research

chemicals when it adopted and switched to the PEP. Summers identified the form the store managers used to order the floor cleaning supplies and products on the date of the incident, and explained the procedure the managers used to order said items directly from Smith-Scharff. In 1987, no difference existed between the supplies, products, and equipment National supplied to the Natural Bridge store as compared to the other stores, and no difference existed (other than brand name) between the supplies, products and equipment National ordered in 1987 as compared to when using Dart Research. National provided to all the stores cleaning items, such as brooms, mop buckets, wringers for the mop buckets, rayon and cotton mops with handles, various pads for the auto scrubber, edging tools, doodle bugs or octopus pads and handles, and the PEP neutral cleaner, stripper, floor finish or restoration to all stores. In 1987, National owned auto scrubbers that were stored on the stores' premises. In the eleven stores in which National employees cleaned the floors overnight the National employees used buffers owned by National.

During the day, National's porters would sweep, dust mop and wet mop any spills or breakages. With respect to cleaning the floors during the day, the procedure at the Natural Bridge store was the same as in all other National stores.

Summers is the National representative that contracted with BBI to clean the floors of the Natural Bridge store overnight. National required BBI to use the PEP. BBI could not have decided on its own to use another program. National provided everything necessary, except the buffer, the pads and fuel for the buffer, and maintenance of the buffer. Any managerial employee of National had the authority to instruct the BBI employees, and request that BBI replace an employee.

Harold Meyer was manager of the Natural Bridge store and

was on duty at the time of the incident. BBI was the cleaning service that performed work at the Natural Bridge store after store the store was closed to the public. BBI would call the manager to tell him if a different employee was arriving to the Natural Bridge store to perform the services. The usual custom was to have one night man from BBI. The one "night man" from BBI, at the Natural Bridge store, was Bass on the date of the incident.

The stock clerks would also work at the Natural Bridge store overnight, and three stock clerks were working the night of the incident. Immediately before the incident occurred, Bass was pushing a broom down the dairy aisle. There was no one else present at the store from BBI. Bass was there to clean the floor. Meyer described the procedure Bass followed for the daily maintenance. This was the procedure Bass was to follow every time he was at the Natural Bridge store. If Meyer saw an area that was being neglected, Meyer informed Art Seise. Everyday, Meyer knew what was going on with the floor. It was common for Meyer to instruct the BBI person regarding certain tasks Meyer wanted done, *i.e.*, cleaning areas of the floor where an item had spilled that would stain the floor, pointing out floor corners that were dirty, Meyer testified he "was always on them pointing out certain areas for cleaning." Meyer did not give Bass any instructions that evening regarding the floor cleaning.

Before this incident, Meyer had the right to tell a BBI employee to the leave the store. Meyer had an occasion to tell a BBI employee to leave. Meyer would tell Art Seise if he did not want a certain person from BBI returning to the store.

Pursuant to the contract with BBI, BBI was to clean the floor of the store on a "regular daily basis." BBI normally sent one person to the Natural Bridge store. National owned an auto scrubber that it kept on the premises.

Meyer kept dust mops, brooms, wet mops, and other forms of cleaning materials stored on the premises of the Natural Bridge store. National's employees on duty during the day would sweep, dust mop and wet mop the floor of the Natural Bridge store "all the time."

During the eight years Meyer was manager of the O'Fallon National store, and during the time Meyer was manager of the Natural Bridge National store, Meyer had National employees who cleaned and swept the floors. During the time Meyer was manager, co-manager or assistant manager at various National stores, Meyer had locations in which, after closing but before opening the store to the public, the floors would be waxed, stripped, cleaned every night, and mopped by National employees. The employees would also use the scrubbers. At other times at other stores, the overnight floor cleaning was contracted out to a janitorial service. From the time Meyer became Assistant Manager to the date of the incident, over eight years, the floors at the various National stores Meyer worked at were always cleaned the same way whether a National employee or a contract janitorial service preformed the cleaning, including the procedures and types of materials utilized.

REASONS FOR DENYING THE WRIT

This Court refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of the state courts under 28 U.S.C § 1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (failure to follow appellate channels provided by state court is fatal).

Missouri law is consistent with federal law: arguments not presented to the trial court cannot be presented in the court of appeals or before the Missouri Supreme Court.

In this Court, for the first time, petitioners argue that they have been denied their Seventh Amendment right to trial by jury and Fourteenth Amendment right of due process. Petitioners never cited the Seventh Amendment nor the Fourteenth Amendment to the trial court, the Missouri court of appeals nor to the Missouri Supreme Court. Their only cite, to the above amendments, was in their December 6, 1995 motion for rehearing to the Missouri Supreme Court, after its final (*en banc*) decision of November 21, 1995.

Petitioners' petition for writ of certiorari to this Court attempts to set out two (2) reasons this Court should grant its writ of certiorari:

> (1) THE UNITED STATES SUPREME COURT IS VIGILANT TO EXERCISE ITS POWERS OF REVIEW IN ANY CASE WHERE IT APPEARS THAT THE LITIGANTS HAVE BEEN IMPROPERLY DEPRIVED OF THEIR RIGHT TO A JURY DETERMINATION AND SUBSTANTIVE AND PROCEDURAL DUE PROCESS.
>
> (2) THE MISSOURI SUPREME COURT SHOULD HAVE GIVEN ITS DECISION PROSPECTIVE-ONLY APPLICATION TO AVERT INJUSTICE, AND PROCEDURAL DUE PROCESS; AND ITS OPINION IS IN CONFLICT WITH THIS COURT'S THREE-FACTOR TEST ANNOUNCED IN *CHEVRON OIL CO. V. HUDSON* . . .

I.

THE MISSOURI SUPREME COURT DID NOT IMPROPERLY DEPRIVE THE PETITIONERS OF THEIR RIGHT TO A JURY TRIAL.

Petitioners first point **"THE UNITED STATES SUPREME COURT IS VIGILANT TO EXERCISE ITS POWERS OF REVIEW IN ANY CASE WHERE IT APPEARS THAT THE LITIGANTS HAVE BEEN IMPROPERLY DEPRIVED OF THEIR RIGHT TO A JURY DETERMINATION AND SUBSTANTIVE AND PROCEDURAL DUE PROCESS."** This is a misplaced "last gasp" attempt to raise a "red herring" issue to "postpone the inevitable."

No constitutional issue is preserved for appeal unless it is raised at the earliest possible time. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of the state courts under 28 U.S.C § 1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (failure to follow appellate channels provided by state court is fatal); *Leahy v. Leahy*, 858 S.W. 2d 221 (Mo. banc 1993)

Petitioners' "earliest possible time" to have raised any constitutional issues would have been at the time they filed their notice of appeal from the trial judge's granting of the JNOV.

Petitioners briefed this matter in the Missouri Court of Appeals, Eastern District and did not raise any constitutional issues.

Petitioners, after transfer was granted to the Missouri Supreme Court, rebriefed this matter and raised no constitutional issues.

The first time petitioners raised any constitutional issues was in their Motion for Rehearing after the Missouri Supreme Court's opinion was handed down. Clearly, petitioners have waived any constitutional questions. *Killian v. J & J Installers, Inc.*, 802 S.W. 2d 158 (Mo. banc 1991).

These constitutional issues, however, have already been decided. The Missouri Supreme Court was faced with the constitutional issues petitioners now wish to "revisit." In *Kemper v. Glick*, 39 S.W. 2d 330, (Mo. banc 1934), *cert. denied*, 52 S. Ct. 29, 284 U.S. 649, 76 L. Ed. 551, the Missouri Supreme Court held that the constitutional question(s) whether the Missouri Workers' Compensation Act takes away common-law rights of action and defenses can only arise where there were constitutional guarantees of such rights and would be violated by their infringement.

II.

THE MISSOURI SUPREME COURT SHOULD NOT AND COULD NOT GIVE ITS DECISION PROSPECTIVE-ONLY APPLICATION FOR TO DO SO WOULD HAVE DEPRIVED THE RESPONDENT OF ITS PROCEDURAL DUE PROCESS, SINCE ITS OPINION DOES NOT ESTABLISH A "NEW PRINCIPAL OF LAW."

Petitioners' second point, **"THE MISSOURI SUPREME COURT SHOULD HAVE GIVEN ITS DECISION PROSPECTIVE-ONLY APPLICATION TO INVERT INJUSTICE, AND PROCEDURAL DUE PROCESS; . . ."**, is without merit. The Missouri Supreme Court's ruling (1) does not

establish a new principal of law by overruling clear past precedent; (2) the purpose and effect of the Missouri Supreme Court's decision would not be retarded by its retroactive application; and (3) there are no interests that must be balanced since there is no change in the law. Petitioners citing *Sumners v. Sumners,* 701 S.W. 2d 720, 722-23 (Mo. banc 1985) has no application to this case. *Sumners, supra,* sets forth the test to determine whether an overruling decision is to have retrospective effect. "At the threshold, however, before the retrospective application of the decision becomes an issue, it must be determined that it 'establish[es] a new principle of law . . . by overruling clear past precedent.' " *Id.* at 724, quoting *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106, 92 S. Ct. 349, 355, 30 L. Ed. 2d 296 (1971); *Thurston v. Ballinger,* 884 S.W. 2d 22, 25 (Mo. App. 1994).

Not to diminish the magnitude of or to take anything away from the Missouri Supreme Court's opinion in this case, it cannot be said to "establish[es] a new principle of law . . . by overruling clear past precedent."

The opinion cites a number of Missouri court decisions, both of the Missouri Supreme Court as well as opinions of the Missouri court of appeals, which have arrived at the same conclusion as to what is "usual business" and "usual course of business" as used in Missouri R.S. § 287.040.1 (1994). (*See* II, C pp. 6 to 9 of the opinion, petitioners' Appendix D).

CONCLUSION

The writ of certiorari should be denied. The Missouri Supreme Court's opinion correctly interpreted Missouri law, as set forth in Missouri R.S. § 287.040.1, *et seq.* (1994) and as set forth in earlier opinions by that court, as well as by the various decisions of the Missouri court of appeals, *e.g., McGuire v. Tenneco*, 756 S.W. 2d 532 (Mo. banc 1988), and properly applied that law to the facts of the case at hand. The decision "made no new law." The opinion did not deprive the petitioners of any guaranteed constitutional rights under the United States Constitution or the Constitution of the State of Missouri.

Respectfully submitted,

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